United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1324

To be argued by
DANIEL J. BELLER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1324

B P/S

UNITED STATES OF AMERICA,
Appellee,

—v.—

FRANK MOTEN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
ROBERT J. JOSSEN,
Assistant United States Attorneys,
Of Counsel.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1324

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK MOTEN,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Frank Moten appeals from an order entered on June 30, 1977, in the United States District Court for the Southern District of New York, by the Honorable Richard Owen, United States District Judge, denying without a hearing Moten's motions pursuant to Rule 33, Federal Rules of Criminal Procedure, for a new trial and for a post-trial *voir dire* of jurors at the trial of *United States* v. *Moten et al.*, 76 Cr. 324.

Indictment 76 Cr. 324, filed on April 5, 1976, charged Frank Moten and thirty-two other defendants in forty counts with various violations of the narcotics laws. Trial of twenty-two defendants commenced on August 10, 1976, and concluded on November 12, 1976. After six and one-half days of deliberations, the jury returned verdicts of guilty against seventeen defendants, acquitted four others, and failed to reach a verdict as to one defendant.

Moten was convicted of conspiracy to violate the federal narcotics law, in violation of Title 21, United States Code, Sections 173, 174 and 846, and of two substantive offenses, in violation of Title 21, United States Code, Section 841.* On January 21, 1977, Judge Owen sentenced Moten to an aggregate of twenty-five years' imprisonment and a $50,000 fine. Moten's conviction, and the convictions of his co-defendants, were affirmed by a unanimous panel of the Court of Appeals in *United States* v. *Moten, et. al* — F.2d —, Dkt. Nos. 77-1085-1094, slip op. 5769 (2d Cir., September 6, 1977). Moten is presently serving his sentence.

On February 18, 1977, Moten filed a new-trial motion, pursuant to Fed. R. Crim. P. 33, which sought, *inter alia*, permission from the District Court to interview trial jurors as to alleged outside influences which may have intruded upon the jury's deliberations; an order unsealing certain documents; and disclosure by the Government of "*Brady*" materials alleged to be in the Government's possession. At argument on the motion on March 24, 1977, the Government advised the trial court that it had no information in its possession which indicated that any juror other than the one discharged during the trial had been tainted by outside influence. The Government further agreed to disclose such evidence if any was developed. Thereafter, by order and opinion filed on June 30, 1977, Judge Owen denied the motions to interview jurors and to disclose documents, on the ground that no basis had been shown to believe that out-

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* The jury failed to reach a verdict against Moten on two additional substantive counts and on the "life count" charging him with managing a continuing criminal enterprise, in violation of Title 21, United States Code, Section 848.

side influence had played any role in the jury's deliberations. From that decision Moten appeals.*

Statement of Facts

A. Summary of Evidence at Trial

For a full statement of the facts in this case the Government respectfully refers this Court to the panel's opinion in *United States* v. *Moten, et al., supra*, slip op. at 5773-75, and to the Government's brief in that appeal, at pp. 5-46.

In sum, the evidence at trial established the existence of a massive national and international narcotics organization whose members were responsible for the distribution of hundreds of kilograms of cocaine and heroin throughout New York and other major American metropolitan centers between 1968 and 1975. Moten played one of the key roles in the conspiracy by acting as a principal advisor to the core group supplier, Jack Brown, by delivering to and obtaining drugs from Brown, by introducing prospective buyers to the core group and

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* Although Moten never explicitly moved on papers for a new trial, his motion was brought under Fed. R. Crim. P. 33, and a request for a new trial was implicit in the relief requested. Indeed, at the time of his sentence on January 21, 1977, Moten's counsel stated: "May the record reflect that a motion for a new trial is being made now before the court." Since counsel had only recently been retained, he asked for an extension of time in which to file papers. (Tr. 9525). Although Judge Owen never explicitly denied the motion for a new trial, such a denial was implicit in his opinion and order. In fact, at the conclusion of the argument on March 24, 1977, the Government specifically asked, without objection, that Moten's motion be treated as a motion for a new trial. (App. H-58, 59). Of course, if the motion is viewed as something other than a motion for a new trial, this appeal must be dismissed for lack of appellate jurisdiction.

vouching for them as reliable persons, by financing the narcotics operations of several of the defendants, and by exchanging ("washing") enormous amounts of money for the defendants to facilitate their narcotics activity.

B. Discharge of Juror Number Ten and the Court's *Voir Dire*

On September 20, 1976, approximately seven weeks after the start of the trial, Government counsel was informed by the attorney for one of the defendants, Sebastian Intersimone, that a juror had sought to contact Intersimone by speaking with Intersimone's sister, Yolanda.

In view of related matters disclosed at that time concerning conversations and actions of certain defendants at the start of the trial, a strong suggestion appeared that the juror already had been corrupted by the defendants. The matter was immediately brought to the district judge's attention. Judge Owen interviewed Intersimone's sister and thereafter interviewed the juror in the presence of Government counsel and Intersimone's attorney. The juror, William Keno,* was asked whether he had discussed the matter with any other juror and stated that he had not. (App. F-4204). Thereafter, the juror was immediately excused. (Tr. 4181-4193). The proceedings were sealed by order of the judge and remain under seal at the present time, as does a subsequent criminal complaint filed in this matter.**

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*Keno was generally referred to as juror number ten during the trial proceedi[illegible] used in this Brief, "Tr." refers to the trial transcript; [illegible] Appellant's Appendix on this appeal; "Br." to Appel[illegible]; "Ct. Op." to the District Court's opinion denying [illegible] motion.

** A fuller account of these developments appears in this Court's decision, *In the Matter of a Grand Jury Subpoena Served Upon David Doe*, Dkt. Nos. 77-1047, 1059, slip op. 2403 (2d Cir. March 17, 1977).

Judge Owen immediately advised all defense counsel of the juror's discharge and the basis of his dismissal. The court determined that it would *voir dire* each of the remaining jurors and first solicited suggestions from all counsel as to the best manner in which to proceed. Thereafter, taking into account the consensus views of all counsel, the court examined the remaining jurors *in camera* and found no taint. Following completion of this *voir dire*, Judge Owen read the jurors' responses to defense counsel, who offered no objections or suggestions for further questioning. The trial then proceeded to its conclusion. (App. F-4194-4234, Tr. 4235).

C. Moten's Motion For a New Trial and the Government's Response

On January 21, 1977, at the time of his sentence, Moten moved, *pro forma*, for a new trial pursuant to Rule 33. Since counsel had only recently been retained, he asked for an extension of time in which to file supporting papers. On February 18, 1977, Ivan Fisher, Moten's attorney, filed a motion and affidavit alleging, without additional support, (i) that other jurors either were involved in or aware of juror number ten's corrupt activity, and, (ii) that during the jury's deliberations certain jurors discussed newspaper articles they had read in the Spanish language press which suggested that the defendants were "bad" people. Moten sought permission to interview the jurors with respect to these matters.

Thereafter, on March 9, 1977, "supporting" documents were filed by Moten and co-defendant Intersimone, whose motion for a new trial also was then before Judge Owen. These materials consisted of assorted hearsay and unsworn documents. The court had before it a tape recording of an unsworn interview of the jury forelady,

Ms. Blau, tape recorded without Ms. Blau's knowledge by private investigator Richard Maline, who had been hired by Intersimone, and conducted by Intersimone's lawyer, Paul Bergman, Esq., on January 14, 1977;* an unsworn two-page letter by Blau (App. B-3); an affidavit signed by Ms. Blau which restates the first but not the second page of the earlier letter (App. B-5); an affidavit of Investigator Maline, providing nothing more than a chronology of his meetings with Ms. Blau (App. B-1); and a hearsay affidavit of Intersimone's trial attorney, David Keegan. (App. B-7). Thereafter, the Government submitted an affidavit of Assistant United States Attorney Daniel J. Beller relating a search of back issues of the Spanish language newspaper, *El Diario;* two articles from that newspaper relating to the trial; and a memorandum of law opposing the motion.

D. The District Judge's Opinion

After extensive oral argument on March 24, 1977, Judge Owen denied the Rule 33 motions in a carefully considered and well-conceived opinion, filed on June 30, 1977. As to the claim involving juror number ten, William Keno, and possible taint with respect to other jurors, the district judge concluded that the only arguable basis for believing that other jurors were aware of the reasons for the juror's discharge, or were involved with him in a

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* Defense counsel never prepared a transcript of the Blau tape.

Ms. Blau is no stranger to this Court. Her letter to Chief Judge Kaufman, after the verdict in the *Moten* case, expressing various disagreements with the American legal system, was an issue in the direct appeal of *United States* v. *Moten, supra.* This Court noted that Ms. Blau's letter was incompetent to impeach her verdict even apart from the fact that it was written after attending a party for defense attorneys at the trial on the night of the verdict. *Id.*, slip op. at 5782, n. 9.

plan to corrupt the jury process, was "in the form of sheer hearsay affidavits" of counsel which related summaries of what they had been told by others. Since the alleged direct sources of this hearsay information were available and "within the reach and control of counsel," the court declined to rely on second and third hand information. This result particularly followed from the facts that even Ms. Blau, in her tape recorded statement,* clearly stated that the juror's discharge *was never even discussed* by the jury, and the court's own *voir dire* of the jury established that no juror had spoken to anyone about the case. (Ct. Op. 1-4; App. D-1-4).

As to the alleged discussions of newspaper publicity in the jury room, Judge Owen found that the discussion, if it occurred, involved not "defendants", as alleged in the Fisher affidavit, but one defendant, Juan Alvarez; that the only newspaper articles that could have been involved contained no prejudicial information; that in any event, Moten was not affected since there was no discussion of Moten in this context, and the jury showed by its verdicts—acquitting some defendants on all charges, and some, including Moten, on some charges—that it considered each defendant individually.

Accordingly, Judge Owen held that Moten had failed to make a sufficient showing on either claim to justify a second *voir dire* of the jury and thus denied his motions pursuant to Rule 33.

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* The court listened to the entire tape and prepared a transcript of a portion of it.

ARGUMENT

POINT I

The District Judge Properly Denied Moten's Rule 33 Motions Without a Hearing.

In his motions pursuant to Fed. R. Crim. P. 33, Moten implicitly sought a new trial * on the alleged grounds that the jury's verdicts had been tainted by the attempted corruption of one juror and by the discussion during jury deliberations of newspaper articles concerning this case. While Moten did not seriously press these matters as sufficiently established by him to require a new trial, he attempted to use his Rule 33 motion as a device for further fishing-expedition discovery, in the hope that some grain of new information could be obtained. On the basis of defendant's woefully inadequate proffer—founded on rank hearsay, incompetent and bold-faced conclusory allegations—Judge Owen rejected this unwarranted attempt to set aside Moten's proper conviction and further found no basis whatsoever to conduct the broad-brushed evidentiary hearings requested by him.

On this appeal, Moten does no more than reargue from his patently defective showing in the District Court that evidentiary hearings were required which ultimately would have entitled him to a new trial. As we will now show, the District Court correctly determined that neither of Moten's claims justified the extreme relief he requested, nor raised any issues to a sufficient degree to have required further exploration by the trial judge.

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* See *supra*, at 3n*.

1. Claim of Taint With Respect to Juror Number Ten

In connection with his motion for a new trial, Moten sought permission to interview the trial jurors seeking to establish their knowledge of juror number ten's attempt to contact a defendant. The district judge, after considering affidavits and other so-called evidentiary submissions by the appellant, and after hearing oral argument, denied the motion in a written opinion. Moten claims that this ruling was erroneous, and, in so doing, asks this Court to disregard the teaching of decades of cases, as well as the wisdom of recently enacted Rule 606(b), Fed. R. of Evidence,* which warn against post-verdict interrogation of jurors because of the danger of harassment and the possibility of corrupt influence—a danger particularly present in this case in which defendants' attempt to corrupt a juror already has been established. This claim is without merit and should be rejected.** *See Mattox* v. *United States*, 146 U.S. 140

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* Fed. R. of Evid. 606(b) provides:

(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

** Point I of Moten's Brief complains of the denial of a "hearing to determine whether contacts between some of Moten's co-defendants and the jury invalidated the convictions ...." (Br. 7). Point II complains about the denial of discovery. These two

[Footnote continued on following page]

(1892); *McDonald* v. *Pless*, 238 U.S. 264 (1915); *United States* v. *Dioguardi*, 492 F.2d 70 (2d Cir. 1970); *Government of Virgin Islands* v. *Gereau*, 523 F.2d 140 (3d Cir. 1975).

Moten's request to interview trial jurors followed the District Court's order of January 31, 1977, forbidding contacts between the defendants' counsel and the trial jurors without prior approval of the court.* Indeed, it is clear that any request for post-trial interrogation of a jury in reality is a request for the district judge to *voir dire* the jury, since this Court has strongly suggested that any such post-trial interrogation be conducted by the court and not by counsel or their investigators. *United States* v. *Brasco*, 516 F.2d 816, 819 n.4 (2d Cir. 1975), *cert. denied*, 423 U.S. 860 (1975); *United States* v. *Miller*, 403 F.2d 77, 83-84 (2d Cir. 1968). Significantly, such an "interview" of the jurors already had occurred during the trial itself. After the dismissal of juror number ten, Judge Owen conducted an independent *voir dire* of each juror to determine whether the jurors had discussed the case among themselves, or whether anyone outside the jury had sought to communicate with them. The *voir dire* established that no such communication had occurred. *See United States* v.

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points, for the most part, are identical, since the discovery denied below was the right to interview jurors. Accordingly, both claims are treated together here. Moten's argument with respect to unsealing of certain documents is discussed separately at Point II of this brief, *infra*.

* On January 31, 1977, prior to the sentencing of defendant Intersimone, the defendant's attorney at that time moved for permission to interview jurors. Counsel did not disclose to the court that he had already interviewed the forelady and tape recorded the interview. Moreover, as was learned later, the forelady, Ms. Isabelle Blau, was not advised that she was being tape recorded. Judge Owen denied the motion and entered the protective order. (App. G-31).

Moten, supra, slip op. at 5786. It is equally significant that a broader inquiry was vigorously opposed by defense counsel, particularly Moten's trial attorney. (App. F-4202-4206).*

Thus, the issue for the district judge in the post-trial setting simply was whether any competent evidence was before the court to undermine or place in doubt the results of the initial jury interrogation. The court properly found that there was no basis for a new inquiry.

Nothing in Moten's "evidentiary" submissions, even accepted at face value, justified a hearing. Investigator Maline's affidavit concededly contained no information of evidentiary substance. Moreover, neither the Blau tape recording, nor the Blau letter was sworn. The Blau affidavit stated no more than that juror number two and juror number eight were friendly with juror number ten; that this relationship dissolved after number ten was excused; and that jurors two and eight believed that a co-defendant, Bernard Brightman, was guilty. Even the tortured interpretation put on these facts by Moten (Br. 22-25), fails to establish any connection to the issue

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* Defense counsel, having been advised during trial of the approach to juror number ten, had an obligation to press the court to inquire further. They could not stand "mute, gambling on an acquittal, while holding this issue in reserve." *United States* v. *Gersh*, 328 F.2d 460, 464 (2d Cir. 1964). The suggestion in Moten's brief, (Br. 48), that defense counsel were "unaware" of an impermissible approach, relies on an obvious typographical error, and reflects the lack of merit in this whole argument. Indeed, while Moten argues that some of the juror's responses to the judge's *voir dire* were ambiguous, Judge Owen read the full transcript to the defendants upon its completion during the trial, and heard no objection or suggestion for further inquiry from Moten or any other defendant. (Tr. 4235).

of alleged taint through the spreading of information that Keno had been approached and excused.*

Furthermore, none of these "facts" advanced by Moten were presented through competent evidence nor were they properly before a court in a post-trial situation, *United States* v. *DioGuardi*, 429 F.2d 70 (2d Cir. 1971); Fed. R. of Evid. 606(b). Judge Owen, therefore, correctly concluded that the only even arguable basis for ordering further interrogation of the jury was contained in the hearsay affidavits of Keegan and Fisher, relating what they had been told by others. The court's refusal to consider these affidavits was proper.

The Keegan affidavit related, in pertinent part:

> "[A]ccording to Ms. Intersimone, juror number ten was not alone at the time he spoke to her. *As I understood it*, he had been speaking with another juror, left that juror to talk to Ms. Intersimone, and then rejoined that other juror. . . . Ms. Intersimone felt she could not say positively which juror had been with Keno. . . . When pressed by me, Ms. Intersimone finally decided she was unable to positively identify the person who had been with Keno, and rather than identify the wrong person, she said she could not identify the other person." (App. B-9, 10; emphasis supplied.)

The excerpted narration clearly shows that Keegan's "understanding" that Ms. Intersimone was referring to another juror may well have been more counsel's view than

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* Moreover, without conceding the admissibility of the Blau tape recording, Ms. Blau stated several times that *none* of the jurors had *any idea* why juror number ten was excused, nor was it ever suggested that there had been an attempt to influence the jury. (Ct. Op. 4; App. D-4).

hers. This problem underscores the inherent unreliability of the affidavit, principally because of its hearsay quality.* Even assuming some relevance to the alleged nearby presence of another juror, who concededly heard none of the conversation between Keno and Yolanda Intersimone, an affidavit of Ms. Intersimone should have been forthcoming on Moten's motion. Ms. Intersimone clearly was available to defendant Moten and indeed had a greater interest in his cause than in the Government's earlier investigation.** Under these circumstances, the district judge was not required to rely on Keegan's hearsay affidavit.*** *United States* v. *Allied Stevedoring Corp.*, 258 F.2d 104, 105-106 (2d Cir.), *cert. denied*, 358 U.S. 841 (1958); *United States* v. *Johnson*, 142 F.2d 588, 592 (7th Cir. 1944).

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* The Government submitted to Judge Owen grand jury minutes of September 20, 1976, which are a part of the sealed record of this appeal. Testimony given at page 46 of those minutes supports the view that Ms. Intersimone did not recognize the second person as another juror. This testimony explains, perhaps, Ms. Intersimone's refusal to submit an affidavit relating the facts as narrated in the Keegan affidavit.

** Nowhere does Moten deny the availability of Ms. Intersimone, though he complains that relations between him and Mr. Intersimone have not always been cooperative. Nevertheless, the motions that are the subject of this appeal had been made in the District Court by Intersimone, as well, and were considered by the District Court at the same time. Clearly, if Ms. Intersimone could have submitted an affidavit stating the facts recounted in the Keegan affidavit to help her brother in his quest for a new trial, she would have done so.

*** This is particularly so since Ms. Blau, in the tape recorded interview, stated that the reasons for Keno's dismissal were *not* a topic for speculation, conjecture or discussion among the jury. (Ct. Op. 4; App. D-4).

Accordingly, *Remmer* v. *United States*, 347 U.S. 227 (1954), upon which Moten so heavily relies, is not controlling here. In *Remmer*, the juror who had been approached was permitted to remain as a deliberating juror, although the court had personal knowledge that an attempt to influence the juror had been made. In this case, the infected juror immediately was removed from the jury.

The Fisher affidavit was equally incompetent evidence on the issue of taint. In essence, this affidavit stated in conclusory language that juror number ten made overtures to a relative of another defendant, presumably Moten, seeking money. (App. A-4, 6). Moten, in his motion, offered no explanation of the nature of the information, or its source, other than that it was possibly a defendant's relative. At oral argument on the motion, Mr. Fisher conceded that he did not even personally interview the source of the information, rendering his affidavit double hearsay. (App. H-29). Moreover, counsel admitted that the individual claimed to be the source of this information, though ill, was available. (App. H-30). Nevertheless, no affidavit was forthcoming. Under these circumstances, particularly where the allegation related in any event only to juror number ten, the district judge was not required to rely on counsel's hearsay affidavit. *United States* v. *Allied Stevedoring, supra; United States* v. *Johnson, supra.**

Finally, even if the Keegan and Fisher affidavits had been considered by the court, they hardly made a sufficient case for a second *voir dire* of the jury. The Keegan affidavit at best suggested that another juror was walking with juror number ten when the latter juror excused himself and spoke to Ms. Intersimone. There is no suggestion that any other juror knew who Ms. Intersimone was, nor that he overheard any conversation, and certainly nothing to overcome the juror's statement to the court in the *voir dire* that he nor the jury had been discussing the case. The Fisher affidavit, as well, states only that

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* It is important to note that the court's order prohibiting contact with the jury did not take effect until January 31, 1977, two and one-half months after the verdict. The defendants had ample occasions to talk with the jury, and indeed took advantage of the opportunity to interview at least one juror, Ms. Blau, as to whom the results of the interview have been reported, and perhaps others about whom no report has been made.

juror number ten may have approached another defendant. While Fisher states that the approach was made for other jurors, there is nothing to support this claim. Thus, even accepting the hearsay affidavits of counsel, no hearing, much less the granting of a new trial, was required.

2. Claim of Prejudice From Newspaper Articles Allegedly Read and Discussed During Deliberations by Two Jurors

As a second prong to his motion, Moten sought permission to interview the trial jurors with respect to an allegation that two jurors had read and discussed during deliberations newspaper articles about the case. This allegation was presented to Judge Owen in the form of an affidavit of Moten's counsel stating that he had learned indirectly from Ms. Blau, the jury forelady, that "at least two trial jurors had mentioned having read about this case, and various of the *defendants*, in Spanish language newspapers," and "referr[ed] to the *defendants* as having been bad people." (App. A-8, ¶ 8). (Emphasis supplied).

The Fisher affidavit, of course, was sheer hearsay. The subsequent submissions to the district judge on this issue illustrated the unreliability of such hearsay affidavits and why, under the particular circumstances of this case, the district judge properly required appellant to submit direct affidavits before ordering the extraordinary relief requested.

After the filing of the Fisher affidavit, the trial court received the Blau tape, the Blau statement and affidavit and a submission by the Government. Blau's unsworn handwritten statements revealed that the alleged comments of the jurors were restricted to *one* defendant, *Juan Antonio Alvarez*, not several as suggested by the Fisher affidavit. (App. B-4).

Even so, the Blau letter, not being sworn, provided no basis for further inquiry. Indeed, the Blau affidavit, which was sworn, *omitted* any reference to the newspaper matter entirely (App. B-5), sugegsting that Ms. Blau was unwilling to affirm her prior statements on this topic under oath. Moreover, as the district judge concluded, even the tape-recorded conversation with Blau, on January 14, 1977, established no more than that if two jurors did make reference to newspaper articles they had read, it was solely with respect to defendant Juan Antonio Alvarez, and not Frank Moten. (Ct. Op. 5; App. D-5).

Thus, at most, Judge Owen had before him unsworn claims that two jurors stated they had seen a newspaper article about Juan Antonio Alvarez. It was not even suggested that Moten's name was mentioned. Accordingly, this was not a case in which actual newspaper articles containing prejudicial information were brought into the jury room, as they were in *Mattox* v. *United States*, *supra*, and *United States* v. *Thomas*, 403 F.2d 1061 (7th Cir. 1972). Nor was this a case in which it was alleged that jurors read an article containing a fact so prejudicial as to require a new trial, as in *Marshall* v. *United States*, 360 U.S. 310 (1959), in which seven jurors read of a defendant's prior conviction, a fact specifically kept from the jury by the trial court. Indeed, there was no claim here that any juror had personal, first-hand knowledge of a defendant's past, such as would give such a juror greater authority in the deliberations. *See United States ex rel. Owen* v. *McMann*, 435 F.2d 813 (2d Cir. 1970). Here, at most, even assuming the admissibility of the unsworn Blau tape and statement, two jurors stated that they had read newspaper articles and had said of Juan Antonio Alvarez that "we know all about him." (Ct. Op. 6; App. D-6). As the district judge specifically stated in his opinion, this information hardly rose to the level of a sufficient showing that a juror discussed or brought *facts*, outside the record, into the jury room, with the "significant possibility that [a] defendant

was prejudiced thereby." *United States ex rel. Owen* v. *McMann, supra,* 435 F.2d 818, n.5.*

Moreover, Moten's motion plainly was deficient since the record before the District Court is barren of any prejudicial facts a juror could have learned from the Spanish newspapers. Indeed, beside his baseless allegation of extraneous influence on the jury, Moten simply did no more to advance his claim, and left to the resources of the Government the proof that no prejudice was possible. As Judge Owen noted, "if there was substance to these allegations of prejudice, one would have expected resourceful defense counsel to have found evidence of them, or at least have directly confronted the issue by stating that he has been unable to find any." In fact, it was the Government that took the trouble of searching through back copies of the Spanish daily and found at most two articles that might have related to the issue, neither of which contained any prejudicial information relating to Moten.**

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* Judge Owen correctly observed: "A juror's statement as to the subjective effect upon him of a newspaper article, if any, is therefore of no consequence. One must look at the article to see if it put before him inappropriate extra-record facts. *United States* v. *Green,* 523 F.2d 229, 235 (2d Cir. 1975), *cert. denied,* 423 U.S. 1974 (1976)." (Ct. Op. 8; App. D-8).

** On March 18, 1977, an Assistant United States Attorney, his student assistant and a qualified Spanish interpreter went to the offices of the newspaper *El Diario-La Prensa,* which, without contradiction in the record, "is the only significant Spanish language newspaper in New York, and is the newspaper referred to by persons referring to the Spanish newspapers." (Beller Affidavit, App. C-1; Ct. Op. 8; App. D-8). Back issues spanning the period of the arrests and trial in the case were examined and two arguably relevant articles were disclosed. Copies of the articles with English translation were furnished to the court. (App. C.-9).

The first article, dated April 23, 1977, reported the indictment of the defendants, which had been unsealed on April 21, 1977. The District Court concluded that with respect to the article, the only information arguably prejudicial to a defendant other than Juan Antonio Alvarez was the headline stating the value of the

[Footnote continued on following page]

Thus, having utterly failed to attempt, let alone sustain, any showing of prejudice, Moten's motion for a hearing and for a new trial properly was denied by the district judge. *United States* v. *Solomon*, 422 F.2d 1110 (7th Cir. 1970); *United States* v. *Brasco*, *supra*; *United States* v. *Homer*, 411 F. Supp. 972, 976-981 (W.D. Penn.), *aff'd*, 545 F.2d 864 (3d Cir. 1976).

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narcotics involved in the case to be $600 million. Judge Owen reasoned that since the evidence at trial established that the defendants trafficked in "hundreds of kilos of cocaine" and several kilos of pure heroin, and the jury heard evidence relating to the value of cut and uncut narcotics as well as the degree to which narcotics could be diluted before distribution, the $600 million figure "is certainly within an order of magnitude of what the jury could conclude from the evidence before it and therefore not prejudicial." (Ct. Op. 11; App. D-11). In any event, no juror read this article since, during the *voir dire* of the jury at the time of its selection, the court inquired of the jurors whether they had read newspaper articles about this case, and the jurors replied that they had not. (Ct. Op. 10-11; App. D10-11).

The second article, dated August 15, 1977, accurately relates certain highlights of opening statements for both sides, statements which the jury heard in court. On this occasion, the value of the drugs involved was put at $200 million, a figure supported by the evidence received at trial. (Ct. Op. 11; App. D-11). In this article Alvarez is characterized as the prime suspect who "escaped after he was let out on a half-million dollar bail." (App. C-9). This statement was not even prejudicial to Alvarez, much less to Moten. Alvarez was tried *in absentia* and, during the course of the trial, the jury learned that, having been notified of the trial date, Alvarez failed to appear and forfeited bail. The jury also learned that the property posted by Alvarez as collateral for bail was substantial. (Ct. Op. 12; App. D-12). The supposed prejudice to Alvarez should be measured in the context of the jury's acquittal of Alvarez on the § 848 count. Moreover, any question of possible "spillover" is resolved by the fact that Alvarez's brother, Nelson, was acquitted by the jury, rendering ludicrous any claim by Moten in this respect. Finally, the newspaper's statement that the agency in charge of the arrest described it as the most important arrest for drug traffickers in the nation, hardly rises to the level of prejudice. *United States* v. *Parman*, 461 F.2d 1203 (D.C. Cir. 1971); *United States* v. *Solomon*, 422 F.2d 1110 (7 Cir. 1970), *cert. denied* as *Sommer* v. *United States*, 399 U.S. 911 (1970).

POINT II

The District Court Properly Refused To Unseal The Proceedings Relating To The Juror's Removal.

Moten argues that he should have been entitled to examine sealed documents relating to the discharge of juror Keno in the hope of finding some information helpful to his Rule 33 motion. The documents he sought to have made available included the juror's sworn statement to Judge Owen just prior to his discharge; * grand jury testimony of the same date; subsequent grand jury testimony by one witness; and a criminal complaint. Moten points neither to statute nor to case authority to support his claim, nor has he ever given any reason why he believes the records will be helpful to his position. Indeed, Judge Owen, to whom all the sealed records were submitted for his consideration in this matter, concluded that there was "nothing helpful to Moten" in the records. (Ct. Op. 2, n.2; App. D-2).** Absent even the barest claim of relevance, and in view of the district judge's finding that the documents contained nothing helpful to Moten, Judge Owen was not required to unseal the grand jury and *in camera* statements and documents requested

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* Ms. Intersimone's statement, which was also sealed, nevertheless is in Moten's possession and is submitted, unsealed, as part of the appendix. (App. E-1).

** Moten's contention that the District Court should not have considered the sealed documents, is disingenuous in the extreme. Plainly, in balancing any possible need for disclosure against the important policy and practical reasons for sealing these documents, Judge Owen had to consider whether any information contained therein arguably was helpful to Moten's position. The careful district judge made clear that he would order disclosure of helpful information if any was found. Since the information in the documents did not further Moten's post-trial claims, there simply was no cause to disclose the fruits of the Government's continuing criminal investigation.

by Moten. *See, United States* v. *Brach*, 542 F.2d 204 (2d Cir. 1976). *Cf., In the Matter of a Grand Jury Subpoena Served on David Doe, supra*, slip op. at 2409. Moreover, the sound public policy in maintaining the secrecy of grand jury proceedings surely dictates that such documents should not be disclosed, except in the most compelling of circumstances, none of which are present in this case.

CONCLUSION

The District Court's order should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

DANIEL J. BELLER,
ROBERT J. JOSSEN,
Assistant United States Attorneys, Of Counsel.

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Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ILSE KUPFERMAN being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 23rd day of November, 1977 she served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Ivan S. Fisher, Esq.
400 Park Avenue
New York, New York 10022

And deponent further says that she sealed the said envelope and placed the same in the mail chute drop for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Ilse Kupferman

ILSE KUPFERMAN

Sworn to before me this
23rd day of November, 1977

Maria A. Israelian

MARIA A. ISRAELIAN
Notary Public, State of New York
No. 31-4521851
Qualified in New York County
Term Expires March 30, 1978